

NEW APPLICATION



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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

COMMISSIONERS

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AZ CORP COMMISSION
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IN THE MATTER OF THE JOINT
APPLICATION OF 360NETWORKS (USA)
INC. AND TOUCH AMERICA, INC.
(DEBTOR-IN-POSSESSION) FOR
AUTHORITY TO TRANSFER ASSETS

Docket No.

T-04011A-03-0749
T-03777A-03-0749

Arizona Corporation Commission

DOCKETED

OCT 09 2003

JOINT APPLICATION

DOCKETED BY

I. INTRODUCTION

360networks (USA) inc. ("360networks") and Touch America, Inc. (Debtor-in-Possession) ("Touch America") (together "Applicants"), through their undersigned counsel pursuant A.R.S. § 40-285, hereby request authority for Touch America to sell and transfer to 360networks certain lit fiber assets in Arizona and related customer contracts dependant on those facilities, as described in this application. The parties are not seeking a transfer of Touch America's Certificate of Convenience and Necessity. 360networks already holds a Certificate of Convenience and Necessity to provide competitive facilities-based interexchange telecommunications services in Arizona. Touch America is currently operating under the protection of Chapter 11 of the U.S. Bankruptcy Code.¹

II. EXPEDITED CONSIDERATION REQUESTED

In light of Touch America's bankrupt status and deteriorating financial condition, expedited consideration and approval of this Application will serve the public interest. As explained below, this transaction must be completed rapidly in order to protect the Debtors' customers from service

¹ See Chapter 11 Case No. 03-11915-MFW *et al.* (Bankr. D. Del.).

1 disruption or worse, preserve the viability of the Debtors' business as a going concern, maximize the
2 value of the Debtors' estate, and enable the successful confirmation of a Chapter 11 plan. On
3 September 11, 2003, the Bankruptcy Court approved the Amended and Restated Asset Purchase
4 Agreement ("Asset Agreement") by and among 360networks Corporation (the ultimate parent of
5 360networks) and the Debtors, authorizing the sale to 360networks Corporation (or a subsidiary
6 thereof) of certain assets to be specified in the Asset Agreement, which Applicants have now
7 determined include the assets described herein. However, it was not apparent until recently, when
8 that determination – including identification of the specific locations for categories of assets – was
9 completed that approval of this Commission would be necessary. Applicants therefore respectfully
10 request that the Commission expedite the processing of this Application and grant the requested
11 authority to permit Applicants to consummate the asset transfer transaction as soon as possible but
12 *not later than October 27, 2003.*

13 In support of this Application, Applicants state as follows:

14 **III. THE APPLICANTS**

15 **A. 360networks (USA) inc.**

16 360networks (USA) inc. is a Nevada corporation with its principal place of business located
17 at 867 Coal Creek Circle, Suite 160, Louisville, Colorado 80027. In Arizona, 360networks is
18 authorized to provide competitive facilities-based interexchange services pursuant to a Certificate
19 of Convenience and Necessity granted by the Commission in Docket No. T-03777A-99-0496.²
20 360networks is a wholly-owned subsidiary of 360networks holdings (USA) inc. which, in turn, is a
21 majority-owned subsidiary of 360networks Corporation, a corporation organized under the federal
22 laws of Canada.

23 **B. Touch America, Inc. (Debtor-in-Possession)**

24 Touch America is a Montana corporation with its principal place of business located at 130
25

26 ² See Application of Worldwide Fiber Networks, Inc. for a Certificate of Convenience and Necessity to
27 Provide Facilities-based Interexchange Telecommunications Services and Petition for Competitive Classification,
Decision No. 62710, Docket No. T-03777A-99-0496 (June 30, 2000). By letter filed June 26, 2000, Worldwide Fiber
Networks, Inc. notified the Commission of its name change to 360networks (USA) Inc.

1 North Main Street, Butte, Montana 59701-9331. Touch America is a broadband fiber-optic
2 network and product and services telecommunications company, providing customized voice, data
3 and video transport, as well as Internet services, to wholesale and business customers. In Arizona,
4 Touch America operates as a provider of intrastate interexchange services pursuant to interim
5 authority and the filed tariffs of Touch America Services, Inc., which was granted a Certificate of
6 Convenience and Necessity granted by the Commission.³

7 **C. Designated Contacts**

8 Correspondence and communications concerning this Application should be directed to:

9 For 360networks: Michael Patten
10 Roshka Heyman & DeWulf, PLC
11 400 North 5th Street, Suite 1000
12 Phoenix, AZ 85004-3906
13 (602) 256-6100 (Tel)
14 (602) 256-6800 (Fax)
15 Email: mpatten@rhd-law.com

16 with a copy to: Grace R. Chiu
17 Swidler Berlin Shereff Friedman, LLP
18 3000 K Street, N.W., Suite 300
19 Washington, D.C. 20007-5116
20 (202) 424-7697 (Tel)
21 (202) 424-7647 (Fax)
22 Email: GRChiu@swidlaw.com

23 For Touch America: Jonathan S. Marashlian
24 The Helein Law Group, P.C.
25 8180 Greensboro Drive, Suite 700
26 McLean, Virginia 22102
27 (703) 714-1313 (Tel)
(703) 714-1330 (Fax)
Email: jsm@thlglaw.com

25 ³ The Certificate of Convenience and Necessity was granted to TeleDistance, Inc. on June 30, 2000. On
26 August 7, 2000, the Arizona Corporation Commission records officially recognized a name change from TeleDistance,
27 Inc. to Touch America Services, Inc. On April 11, 2002, Touch America, Inc. filed an application with the Commission
seeking approval of the assignment and transfer of Touch America Services, Inc.'s Certificate in Docket Nos. T-
04011A-01-0303 and T-03911A-01-0303. A staff report has recommended approval of these Dockets; however, at this
time, they remain pending.

1 **IV. DESCRIPTION OF THE PROPOSED ASSET TRANSACTION**

2 360networks' indirect corporate parent, 360networks Corporation, Touch America, and
3 Touch America's parent, Touch America Holdings, Inc., have entered into an asset purchase
4 agreement whereby 360networks will acquire certain assets from Touch America. These assets
5 include certain lit fiber optic routes in Arizona in which Touch America holds an indefeasible right
6 of use ("IRU"). Specifically, the Arizona physical assets that are being transferred are: (i) dark
7 fiber Indefeasible Rights-of-Use (IRUs) in Qwest-owned fiber running from El Paso to Tucson,
8 Tucson to Phoenix, Phoenix to Yuma and Yuma to Brawley, California and (ii) optronics that
9 Touch America purchased and installed in the fiber. These fiber assets are currently being used to
10 provide private-line and dedicated internet access communications services to large Arizona
11 business customers. In addition, the customer contracts that specifically depend on those fiber assets
12 for service are being transferred to 360networks.

13 Touch America is not seeking to discontinue its provision of telecommunications services in
14 Arizona through this application. Rather, Touch America is transferring to 360networks the
15 specific subscriber base that is served through the physical assets pursuant to the procedures set
16 forth in 47 C.F.R. § 64.1120(e).⁴ Touch America and 360networks have provided prior written
17 notice of the change in provider to affected customers pursuant to FCC requirements. That notice
18 also confirmed that the transition will be seamless and that service will continue under the same
19 terms and conditions. An exemplary copy of the notice is attached.

20 **V. PUBLIC INTEREST CONSIDERATIONS**

21 As noted above, Touch America is currently operating under the protection of Chapter 11 of
22 the U.S. Bankruptcy Code. Given the current bankrupt status of Touch America, this transaction
23 must be completed rapidly in order to preserve the viability of the Debtors' business as a going
24 concern, maximize the value of the Debtors' estate, and enable the successful confirmation of a
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26
27 ⁴ The subscriber base that is being transferred includes 54 retail business customers and 15 wholesale
customers (typically other carriers). The services being provided to the retail business customers are data services, not
voice services.

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Chapter 11 plan. Consummation of the proposed asset transfer will therefore serve the public interest.

The proposed asset transfer also will serve the public interest by enhancing 360networks' existing fiber optic network, which is one of the largest and most advanced on the continent. 360networks' network spans 29,000 route miles, reaches 69 markets in the U.S. and Canada, and includes 13 metro fiber networks in the largest U.S. cities and 23 metro fiber networks in nine Canadian provinces. The addition of Touch America's lit fiber routes in Arizona will enhance 360networks' presence in the market as a competitive provider of network infrastructure and broadband communications services. Accordingly, the Parties respectfully submit that consummation of the proposed transaction will serve the public interest.

VI. CONCLUSION

For the reasons stated above, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by a grant of this Application. Indeed, failure to grant it would directly harm the public interest. In light of the exigent circumstances, Applicants respectfully request expedited treatment to permit Applicants to consummate the asset transfer transaction as soon as possible but *no later than October 27, 2003*.

RESPECTFULLY SUBMITTED October 9, 2003.

ROSHKA HEYMAN & DEWULF, PLC

By



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(703) 714-1330 (Fax)

Attorney for Touch America, Inc.
(Debtor-in-Possession)

ORIGINAL + 13 COPIES of the foregoing
filed October 9, 2003, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

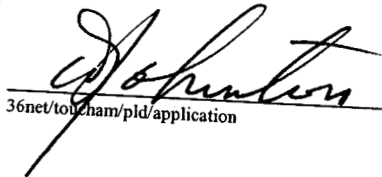
COPIES of the foregoing hand-delivered
October 9, 2003, to:

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36net/toucham/pld/application

VERIFICATIONS

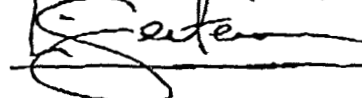
VERIFICATION

I, Lin Gentemann, declare under penalty of perjury that I am General Counsel of 360networks (USA) inc. ("360networks"), joint applicant in the foregoing Application; that I am authorized to make this Verification on behalf of 360networks; that the foregoing Application was prepared under my direction and supervision; and that the contents are true and correct to the best of my knowledge, information, and belief.

Name: Lin Gentemann

Title: General Counsel & Corporate Secretary

360NETWORKS (USA) INC.



Dated: October 9, 2003

VERIFICATION

STATE OF MONTANA :

SS.

COUNTY OF SILVER BOW :

I, Michael James Meldehl, state that I am President of Touch America, Inc. (Debtor-in-Possession) ("Touch America"), a joint applicant in the foregoing filing; that I am authorized to make this Verification on behalf of Touch America; that the foregoing was prepared under my direction and supervision; and that the contents are true and correct to the best of my knowledge, information, and belief.

Name:

Title:

TOUCH AMERICA, INC
(Debtor-in-Possession)

Sworn and subscribed before me this 9th day of October, 2003.

Notary Public

My commission expires 7-8-2005

NOTICE LETTER



**AN IMPORTANT NOTICE FROM TOUCH AMERICA AND 360NETWORKS
REGARDING YOUR PRIVATE LINE / DEDICATED INTERNET ACCESS SERVICES**

June 26, 2003

Dear Valued Customer:

We are pleased to inform you that, on June 20, 2003, *360networks* announced plans to purchase Touch America's Private Line and Dedicated Internet communications businesses, including Touch America's customer base. This transaction is subject to approval of the Bankruptcy Court as Touch America recently filed for bankruptcy protection under Chapter 11. The anticipated date for the transfer of your account to *360networks* is August 15, 2003, or as soon thereafter as the necessary Bankruptcy Court and regulatory approvals can be obtained.

Touch America and *360networks* are working closely together to ensure that the transfer of your account to *360networks* will be seamless. In the meantime, Touch America and *360networks* assure you that there will be no interruption of service or change in the level of support you receive from Touch America today as a result of this transaction.

Following the transfer of your account to *360networks*, your service will continue under the same terms and conditions that you currently enjoy. Notice of any future changes in rates, terms and conditions of service will be provided to you as required by law, however no changes are anticipated. *360networks* will be responsible for any fees or costs associated with the transfer of your account. Subject to the terms and conditions of your existing agreement with Touch America, including applicable termination penalties, as is standard practice, you have the option to choose another provider for your communications service. *360networks* will work to resolve any complaints you may have filed against or raised with Touch America that have not been resolved by the time your account is transferred.

We are very excited about this acquisition. The addition of the Touch America facilities enhance *360networks*' existing network, which is one of the largest and most advanced on the continent. *360networks* optical mesh fiber network spans 33,000 route miles, reaches 60 major cities in the U.S. and Canada, and includes 17 metro fiber networks in nine Canadian provinces, and 12 metro fiber networks in the largest U.S. cities. Over this state-of-the-art network, *360networks* currently provides telecommunications services and network infrastructure to over 13,000 carrier and enterprise customers. *360networks* offers a comprehensive range of services including traditional local and long distance voice products, Internet, Transport and LAN/WAN connectivity.

In the very near future, you'll have the opportunity to take advantage of the combined network and product offerings of the two companies, giving you access to new markets, extended network reach across North America and greater network capabilities. To learn more about *360networks* and the new services that will be available to you, please visit *360networks'* website at www.360.net.

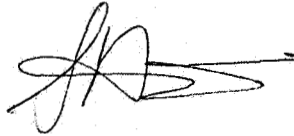
We are committed to ensuring you are kept informed of these exciting changes over the next few months and will continue to provide you up to date information. Please contact your local Account Representative or Touch America at 800-710-8922. Questions regarding *360networks* may be directed to Shawna Arndt of *360networks* at 403-770-5724.

It has been Touch America's pleasure to provide you with quality private line and dedicated internet and Touch America emphasizes that you are a valued customer and will be treated as such by *360networks*.

Cordially,



Mary Gail Sullivan
Vice President, Customer Development
Touch America, Inc.



Shawna Arndt
Director, Client Services
360networks